

DUTCH COURTS ARE RELUCTANT TO PIERCE THE CORPORATE VEIL
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1. Introduction

- 1.1. As many of you may know, the concept of piercing the corporate veil is complex and will generally not be allowed too often in court. In the ship arrest practice however, identification of companies can be a valuable tool to perform ship arrests. It is a well-known fact that shipping companies often work with multiple different entities and it can be difficult to determine who you are actually dealing with.
- 1.2. In the Netherlands, there's been a lot of discussion about the concept of piercing the corporate veil. While some people say that piercing the corporate veil should be possible to avoid abuse of corporate law, others say that companies should be free in their choice of organisation.
- 1.3. Case law in the Netherlands established a general rule on the identity of companies: as a starting point, every company should be considered as an independent entity. However, special circumstances may arise that justify deviation from this general rule (*Dutch Supreme Court, Rainbow Products v. Collector of State Taxes, ECLI:NL:HR:2000:AA7480*).

2. Two tracks of liability

- 2.1. If a company uses certain other companies within its own group, this can generally lead to confusion for third parties. A ship owner will often have a name very similar to the shipping company or fleet/beneficial owner/manager, for example. This can result in confusion as to which company entered into an agreement or against which company a potential claim could exist.
- 2.2. In the Netherlands, the use of different companies may under some circumstances lead to abuse. Under Dutch law, a company may be deemed to abuse the difference in identity between several companies if one company has decisive control over another company and abuses the different identities of these companies to attain an illicit goal that should not have to be honoured by law.
- 2.3. Once the abuse of the difference in identity is established, Dutch law provides two separate tracks to construe liability of the company responsible for the abuse, as established in the landmark case *Rainbow*. First of all, there is the indirect track: the company responsible for the abuse can be liable based on a wrongful act. The company's own behaviour that led to the misleading of third parties and confusion as to the different companies involved can be considered wrongful.
- 2.4. A third party that suffers damages as a result of the abuse, can get compensated for these damages based on a wrongful act (tort). If the ultimate goal of the abuse of identity is deemed to be illicit (i.e. with the sole aim to frustrate recovery of debts by its creditors) and should in all fairness not have to be honoured by law, then the wrongfulness of such abuse will generally be a given.
- 2.5. The second liability track under Dutch law for the company abusing the different identities is via the concept of *identification*. In other words: piercing the corporate veil. Under Dutch law, identification can be defined as follows: the difference in identity between companies is completely erased. The companies in question are considered as one. This also means that all companies that can be identified with one another will be jointly and severally liable for each other's debts.

3. When can the corporate veil be pierced?

- 3.1. The next question that arises, is whether under Dutch law one can simply choose between the two tracks of liability in case of abuse of different identities of companies. The answer is negative.
- 3.2. When assessing whether the corporate veil can be pierced, Dutch case law applies the principle of proportionality. The most important indicator is whether redress for third parties can be accomplished and by what means. If the abuse of identity of a company constitutes a wrongful act, then third parties will most likely be able to see their damages compensated. This means these third parties do not need the concept of identification in order to retrieve their damages (unpaid bills). In other words: if the first track of liability (based on a wrongful act) will lead to redress for the aggrieved party, then a court will simply not come to the question whether the corporate veil can be pierced.
- 3.3. The reason behind this, is that piercing the corporate veil can be seen by the Dutch judge as “a bridge too far”. The Dutch Supreme Court ruled in the *Rainbow* case that, in cases where a company is responsible for the abuse of the difference in identity between different companies, this company should compensate the creditor for the damages it incurred because of this abuse. This does not implicate however, that the amount of damages is without any question the same amount as the claim for which payment was avoided by the abuse. In other words: the company that abused the difference in identity should not be jointly and severally liable for any claim whatsoever of the other company. Redress for the damages caused by the abuse is considered enough and the Dutch courts rule that the corporate veil should not be pierced too easily.
- 3.4. However, the Dutch Supreme Court ruled that circumstances may arise that are so extraordinary, that identification is the most suitable way of redress. Again: the possibility of redress for the aggrieved party is the determining factor when assessing whether the corporate veil should be pierced. One way or another, the aggrieved party should be able to recover the damages it suffered due to the abuse of the difference in identity between companies. Piercing the corporate veil may under Dutch law be described as the last resort to retrieve damages, that will not be approved easily. If another solution for compensation of damages is at hand (such as a wrongful act or unjust enrichment), then the corporate veil will not be pierced.

4. Piercing the corporate veil in the ship arrest practice

- 4.1. How does this Dutch legal theory play out for the ship arrest practice? In the Netherlands, a ship can only be arrested for a claim against the (legal) owner of the ship (save for claims similar to liens and provided Dutch law applies). A claim against any other party in the operation of the ship, can generally not lead to an arrest. In a lot of cases however, the arrest of the ship might be the only way of redress for a third party that incurred damages caused by a ship owner or a company that may be identified with the ship owner.
- 4.2. You might be familiar with practices such as the sudden sale of the ship to another company within the same group or a shipping company that entered into the agreement which seems to be completely controlled by the ship manager/beneficial owner. These practices result in a situation where the aggrieved party does not have a claim against the owner of a ship (anymore) and thus, in most cases, cannot arrest this ship.

4.3. When applying the Dutch doctrine of the two tracks of liability in case of abuse of the different identities of companies and the fact that proportionality and redress are the determining factors, it may appear that, within the shipping arrest practice, identification can indeed be the most suitable way of redress. In practice, piercing the corporate veil may very well be the only way to arrest a ship and retrieve one's claim in a situation where the ship owner is hiding behind corporate structures.

5. Indicators of abuse in order to pierce the corporate veil

5.1. The abuse of different identities of companies can potentially lead to piercing the corporate veil, provided there are extraordinary circumstances. Dutch case law provides some examples of indicators that can point to abuse:

- The different companies have the same directors and shareholders;
- One of the companies has decisive control over the other(s);
- The companies perform the same activities;
- One company ceases its activities, while another company within the same group takes over these activities;
- The ownership of ships quickly shifts between the different companies;
- The companies have (close to) identical names;
- The different companies use the same address, phone number, logo, invoices or letter headers;
- Both companies correspond with third parties about the same issues.

Mostly, several of these factors should be present in order for there to be abuse.

5.2. Identification will not be present purely based on the fact that companies form part of the same group. Nor can the mere use of the same name or the same shareholders mean that companies should be identified with one another. All in all, there should be (several) indicators of abuse, the goal of the abuse is illicit and will usually be to avoid payment and there should be exceptional circumstances that justify the piercing of the corporate veil, mostly meaning that identification would be the only possible means of recourse.

6. Case law: piercing the veil in the shipping practice

6.1. Last year, we discussed a strange arrest case in which our firm successfully argued that the corporate veil should be pierced in order to arrest a ship. In this case, our client dealt with a shipping company, against whom the claim existed. This shipping company quickly on-sold all the ships it owned to another company within the same group, another company within the group was declared bankrupt after which the client was requested to file its claim with the curator and all companies were registered at the same address. The court of Rotterdam, on an ex parte basis, assumed that the corporate veil could indeed be pierced and allowed the arrest. The new ship owner paid in full but under protest and after two years (!) has recently demanded repayment under the threat of court proceedings.

6.2. This strange arrest case and applying the Dutch doctrine of piercing the corporate veil to the ship arrest practice, may give rise to high expectations as to the chances of lifting the corporate veil in the Netherlands. Last year's strange arrest case however, was qualified as "strange" for a reason. Even though many lawyers bring forward the argument of identification in order to try and arrest a ship, this concept is rarely accepted by the Dutch courts. Judges mostly argue that

there are no circumstances that extraordinary, that identification will be deemed the most suitable means of redress.

- 6.3. The court of Rotterdam, for example, ruled in 2015 (*Bremer Landesbank v. Asian Tide Shipping – M/V “ASIAN TIDE”*) that the use of the same name, address and phone numbers by three different companies was not enough to pierce the corporate veil, as the use of these same details is common within the shipping practice. The court of Aruba also ruled in 2018 (*CITGO Petroleum v. Phillips Petroleum*) that several companies could not be identified with one another in order to perform a ship arrest. The fact that companies form part of the same group is insufficient to assume that these companies are trying to attain common interests or are using the company structures solely to avoid redress of third parties.
- 6.4. In another judgment (2010) the court of Rotterdam (*Deleclass Shipping v. Liebermann – M/V “SIDERFLY”*) also denied the concept of identification, ruling that there were no exceptional circumstances that justified the erasing of the difference in identity between two companies. The similarity between names of the companies, the same shareholders and board and the fact that one of the companies received all deliveries and performed payments for the other company, were deemed insufficient to pierce the corporate veil.
- 6.5. The court of Leeuwarden (*Caballo Frion v. Greatship (India – M/V “CABALLO GENITOR”*) also denied the existence of exceptional circumstances that would constitute identification between companies in 2012. In this case, the company in question was founded exclusively for the purpose of restructuring the group, owned for 99.99% by its mother company and both companies had the same director and shareholders. Furthermore, the company that needed to be identified with its mother company to allow a ship arrest was mentioned as the owner of the ship in Equasis Ship Folder, herewith manifesting itself as the owner of the ship. All of these circumstances however, were not enough for the court to pierce the corporate veil in order to come to an arrest of the ship.
- 6.6. All in all, the extraordinary circumstances necessary to pierce the corporate veil indeed seems to be a high threshold to meet. But as you all know, the ship arrest practice is everything but ordinary... To be continued?

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